IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 102 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE R.P.DHOLAKIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

AMBALAL HARIBHAI

Versus

KASHIBEN WD/O PATEL SOMABHAI HIRABHAI

Appearance:

1. Second Appeal No. 102 of 2000

MR AR MAJMUDAR for Petitioners No. 1-2

MR IM PANDYA for Respondents No. 1-2

CORAM : MR.JUSTICE R.P.DHOLAKIA

Date of decision: 08/10/2001

ORAL JUDGEMENT

Being aggrieved and dissatisfied by the judgement and decree passed by the learned 3rd Joint Civil Judge, Senior Division, Vadodara, dated 23.9.1987 in Regular

Civil Suit No. 843 of 1987 and confirmed by the learned 2nd Extra Assistant Judge, Vadodara, in Regular Appeal No. 1 of 1988 dated 17.7.2000, the present appellants original defendants have preferred this Second Appeal, against the concurrent judgement.

2. Initially, R & P were called for on 18.12.2000 and interim relief was granted and thereafter, in pursuance of issuance of notice, respondent no. 2 appeared through his learned advocate Shri I.M. Pandya. It is clear from the judgement and decree passed by the learned Extra Assistant Judge in Regular Appeal No. 1 of 1988 that respondent no. 1 Kashiben, widow of Patel Somabhai Hirabhai was expired and therefore, her name was deleted vide order passed below Ex. 94 in that appeal, still, she has been joined as respondent no. 1 in the present Second Appeal and therefore, her name is required to be deleted and hence deleted.

3. The brief facts are summarized as under :-

A suit being Regular Civil Suit No. 38/80 was filed in the court of learned Civil Judge (JD) at Sinor by the present respondent no. 2 and original plaintiff no. 1 and subsequently, it was transferred to 3rd Joint Civil Judge (JD) at Vadodara and renumbered as Regular Civil Suit No. 843/87. Original plaintiff no. 1 is the widow of deceased Patel Somabhai Hirabhai and present respondent no. 2 is the son of Somabhai Hirabhai, whereas, the present appellant original defendant no. 1 is the brother and no. 2 is a nephew of deceased Somabhai. As the land narrated in para -1 of the plaint was belonging to the plaintiffs, plaintiff no. 1 got all the agricultural land and other movable and immovable properties by virtue of successor of deceased Somabhai Hirabhai Patel and Hakpatrak Entry No. 1650 to that effect was mutated in revenue record. According to plaintiffs, all the properties are ancestral properties and not self acquired properties of deceased Somabhai and therefore, being the heir and legal representative of deceased Somabhai, they are entitled to get it. After the demise of Somabhai, as the defendants were taking disadvantage of ill-health of deceased Somabhai by making a disputed Will, the plaintiffs filed the suit for declaration that the disputed Will is not binding to them and deceased Somabhai had no right to execute a disputed Will in favour of defendant as it was not a self acquired property of Somabhai.

Present appellants - original defendants appeared and filed their written statement at Ex. 21 denying all

the allegations. It was contended that Entry No. 17/24 in Hakpatrak, which was challenged by the defendants, was confirmed by Mamlatdar. Being aggrieved by the order passed by the Mamlatdar, they preferred an appeal. It was also denied that suit property was ancestral property of deceased Somabhai and hence he was entitled to execute Will in question and therefore, suit be dismissed.

Based on the pleadings made by the parties, necessary issues were framed by learned trial Judge at Ex. 25. After giving opportunity to the party concerned and considering the oral as well as documentary evidence on record, the suit was decreed by the learned 3rd Joint Civil Judge (JD), Vadodara in favour of the plaintiffs. Against which, the defendants preferred Regular Appeal No. 1/88 in the Court of learned Extra Assistant Judge, Vadodara. Considering the submissions made by the learned advocates appearing for the respective parties, said appeal was dismissed by the learned 2nd Extra Assistant Judge, Vadodara, confirming the judgement and decree dated 23.9.1987 passed by the learned 3rd Joint Civil Judge (JD) at Vadodara in Regular Civil Suit No. 843 of 1987. It is against both the concurrent judgements and decrees passed by the courts below, present Second Appeal has been filed by the appellants.

4. I have heard learned counsel for the appellants Shri A.R. Majmudar and Shri I.M. Pandya, learned counsel for the Respondent No. 2. I have gone through the R & P which has been shown to me by the learned counsel for the respective parties alongwith two reasoned judgements of the trial Court as well as the lower Appellate Court.

5. It is contended by the learned counsel for the appellants that both the courts below have not rightly come to the conclusion that the Will is not a genuine Will and looking to the facts and circumstances of the case, the question as to whether the properties mentioned in the Will were self acquired properties or ancestral properties is a question to be decided. It was further contended that whether the Will can be executed only for self acquired properties and not for ancestral properties is also a question of law involved in this case.

6. Keeping in mind the above questions referred by the learned counsel for the appellants, I have gone through reasoned judgements delivered by the courts below and oral as well as documentary evidence, which have been shown by the learned counsel for the respective parties. However, facts remains that both the courts below have

come to the conclusion on the basis of oral as well as documentary evidence which are on record that property in question i.e. agricultural land as described in para - 1 of the plaint, is not a self-acquired property but an ancestral property. It is not in dispute that prior to the death of Somabhai on 28.4.1979, suit property i.e. agricultural land had been entered in revenue record by R.C.S. entry No. 1650 dated 14.6.1979 in the name of plaintiff no. 1 after following all required procedures and though it was challenged by the present appellants original defendants before the Mamlatdar, same was rejected. So, the plaintiff no. 1 Kashiben has become the owner of the property by virtue of succession as she was the only heir and legal representative of the deceased Somabhai.

7. As far as alleged Will is concerned, no original Will has been produced and proved by the present appellants - original defendants, copy of which has been produced and exhibited as Ex. 101. To prove the alleged Will, the defendants have examined witness Manubhai Vitthalbhai at Ex. 121, the alleged attested witness of Will in question and Kanchanbhai Ranchhodbhai Patel at ex. 117. Shri Kanchanbhai has admitted in his deposition that deceased Somabhai was admitted in Dabhoi Hospital on 2.3.79 and discharged on 8.3.1979 and a Will was drafted outside the Dabhoi hospital on that day and it was registered at Dabhoi on the next day. He has also admitted that thereafter on 9.3.1979 the deceased Somabhai was admitted in Muljibhai Urological Hospital at Nadiad. He has further admitted that since deceased Somabhai was suffering from kidney problem for the last 1 and 1/2 years, the Will which was written outside the Dabhoi hospital on 8.3.1979 was not registered on the same day but on the next day. Keeping in mind the above and other evidence on record including the certificate issued by Medical Officer Ex. 99, both the courts below have come to the conclusion that Somabhai was having a severe pain due to kidney problem. It was opined by the medical officer of Referral Hospital Dabhoi as under :-

> " Its a suspected case of Cancer Prostate and Patient was restless and drowsy due to kidney failure.".

Looking to this physical condition of Somabhai, when he was having kidney problem, he would not be in a position to think over for the disposal of his property and on the basis of the medical evidence and other evidence on record, the learned trial Judge has given finding that testator Somabhai was not in a fit mental

condition to execute the Will. I have also gone through the documentary as well as oral evidence upon which, the parties have relied upon including ex. 99, which is the certificate issued by the doctor. I accept the findings given by courts below and the facts coming out from the deposition of defendant no. 1 Kanchanbhai at Ex. 117 that he himself, testator Somabhai, Mangalbhai Gopalbhai, Dharmdas Lallu, Manilal Viththalbhai, Ambalal Haribhai, all have decided to execute the Will. Witness Manubhai Viththalbhai has deposed that particulars of Will and property narrated it were given by Mangalbhai and Gopalbhai at the time of drafting the Will. Keeping in mind the above admission on the part of the defendants, facts are sufficient to prove that the Will was not executed at the instance or desire of testator Somabhai but at the desire of relatives and respondent and hence same has not been accepted by the court.

8. Learned counsel for the appellants has relied upon AIR (38) 1951 Kuchch page-20 and AIR Gujarat Page -75, wherein, it has been observed that a WILL should be executed at a desire of testator, not at a desire of relatives or another person. This reported judgement fully support the case of testator Somabhai that at the time of executing the Will, the deceased was not in a physical and mental capacity to execute the Will, and therefore, it was the duty of the defendants to remove the doubt by cogent and strict proof by propounder and they have failed in doing so and therefore, both the courts below have rightly come to the conclusion on the basis of oral as well as documentary evidence on record and since it is a finding of fact, this court is not inclined to alter it.

9. Even at the cost of repetition, I would like to say that original Will is not produced before the trial court or before the lower Appellate Court or before this Court and no explanation has been given by the appellant. In these circumstances, when both the courts below have come to the conclusion that the property in question i.e. suit property was not a self-acquired property of the deceased Somabhai, but an ancestral property, and Somabhai had no right to execute the Will and hence the Will in question is not a valid and genuine one and therefore, question to obtain a probate for a Will in question does not arise.

10. The learned trial Judge as well as learned Appellate Judge have fully discussed the issue of physical condition of the deceased at the time of executing the will relying on the oral and documentary

evidence adduced and produced by both the parties and rightly replied it.

11. In view of what has been stated hereinabove, when the Second Appeal has been preferred by the appellants against the two concurrent judgements of the trail Court and also when learned counsel for the appellant is not in a position to convince this Court to interfere with the same, this Court has no hesitation in holding that there is no substance in this Second Appeal and hence decree passed by the Trial Judge and confirmed by the lower Appellate Court are not required to be interfered with and Second Appeal is required to be rejected.

12. In the result, the Second Appeal is rejected with no order as to costs.

(R.P. Dholakia,J.)

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